S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2005
v	No. 251150 Muskegon Circuit Court
CEDRIC ALLEN II, Defendant-Appellant.	LC No. 03-048401-FC

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery.[1] The trial court sentenced defendant to a prison term of forty-five months to fifteen years. Defendant appeals his conviction and sentence, and we affirm.

I

Defendant argues that his pretrial lineup was overly suggestive. We agree with the trial court that it was not. A trial court's decision to admit identification evidence generally will not be reversed unless it is clearly erroneous. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* Because counsel was present at the lineup, defendant bears the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *Stovall v Denno*, 388 US 293, 301-302; 87 S Ct 1967, 1972; 18 L Ed 2d 1199 (1967); *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004); *Hornsby*, *supra* at 466. The fairness of an identification procedure is evaluated in light of the total circumstances. *Id.* The test is whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Id.*

[1] MCL 750.529.

Defendant points to a number of physical differences – height, size, build, age, and complexion – as evidence of unfair suggestiveness. These differences, while significant, do not amount to an overly suggestive lineup. Discrepancies as to physical characteristics among the lineup participants do not necessarily render the procedure defective. *Id.* Rather, differences generally pertain to the weight of an identification and not to its admissibility. *Id.* Differences are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants. *Id.*

Defendant is five feet eleven inches tall and weighs 286 pounds. The trial court noted the practical difficulty of locating black teens in custody who weighed three hundred pounds. See *People v Barnes*, 107 Mich App 386, 390; 310 NW2d 5 (1981) ("It would be unusual indeed if the police had five persons with similar characteristics locked up in the same jail."). Finding none, the police included a deputy in the lineup who resembled defendant. The fact that only the deputy had a mustache does not make the lineup overly suggestive. See *People v Hughes*, 24 Mich App 223, 225; 180 NW2d 66 (1970) (holding that mere fact that only defendant had goatee in lineup did not render lineup improper).

Evidence demonstrates that the lineup was not unfairly suggestive. Factors relevant to the fairness of a lineup include the opportunity of the witness to view the culprit at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the culprit, the level of certainty demonstrated by the witness at the identification, and the length of time between the crime and the identification. *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375, 382; 34 L Ed 2d 401 (1972); *People v Solomon*, 391 Mich 767; 214 NW2d 60 (1974).

These elements apply favorably to the employee witness who identified defendant at the lineup after he robbed her. She had opportunity to view his face in the small storefront as he demanded cash from the register. She told police that the suspect was a young black male weighing three hundred pounds, standing between five feet, nine inches and 6 feet tall, and wearing a brown leather coat and a brown ski cap. She had no doubt that she identified the right person at the lineup. The lineup occurred within a day of the crime. She indicated that without the benefit of the lineup she would have recognized defendant had he come back to the scene of the crime. On the day of the crime when police brought a suspect other than defendant for her to view, she stated with certainty that he was not the right person based on his face, build, height, and clothing. Accordingly, we conclude that the independent recollection of the witness and not the suggestiveness of the lineup supported her identification of defendant at the lineup.[2]

[2] Moreover, defendant was tried separately for two similar robberies happening in the same area within a week. Six witnesses from those robberies viewed the same lineup as the sole complaining witness in this case. Their testimony was presented and admitted as relevant to the issue of identification. One witness erroneously identified the deputy as the robber. Another witness made no identification. A different witness only identified defendant after having him turn around. One would expect an impermissibly suggestive lineup not to produce such results but rather immediate, uniform, and positive identification by all or nearly all witnesses. Also, we note that defense counsel did not object to the lineup when it occurred. Although we do not rule that waiver is the consequence of that decision, the lack of an objection at the lineup does tend to

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II

Defendant contends that the following remarks of the prosecutor during closing statements improperly denigrated defense counsel: "realize that [defense counsel] has a job, and that job is to confuse the issue, that job is to confuse the elements, that job is to take you everywhere but what the defendant did that night." Defendant did not object to those remarks. Because defendant did not object at trial, his claim of prosecutorial misconduct is reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct is decided case by case, and the reviewing court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273. The propriety of a prosecutor's remarks depends on all the facts of the case. *Rodriguez, supra* at 30. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

The prosecutor's remarks were improper. See, e.g., *People v Guenther*, 188 Mich App 174, 183; 469 NW2d 59 (1991) (holding that it was "entirely improper" for the prosecutor to question defense counsel's ethics). While rebuking the prosecutor for his improper remarks, the *Guenther* Court held that they did not entitle defendant to a new trial. *Id.* at 183, 186-187; see *also People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1997) (prosecutor's remark that defense counsel often attack the thoroughness of police investigations as a ploy to convert the case to one against police did not deprive defendant of a fair trial). The same result should obtain here.

The prosecutor's remarks were isolated and amenable to correction by jury instruction. We will reverse for improper remarks from the prosecutor only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks or where our failure to review the issue would result in a miscarriage of justice. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998), citing *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Defendant identifies only one improper set of remarks, not the repeated and troubling conduct before this Court in *People v Bairefoot*, 117 Mich App 225; 323 NW2d 302 (1982), and *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988). Even assuming that one particularly egregious statement in a closing argument may render the entire trial unfair, this is not such a case.

III

Defendant claims that evidence of his invocation of the right to silence was improperly admitted. The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573;

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suggest that the lineup was conducted fairly.

628 NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). The privilege applies if a defendant is subjected to police interrogation while in custody or deprived of his freedom in any significant way and if a defendant's silence follows *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 164-165; 486 NW2d 312 (1992); *People v Alexander*, 188 Mich App 96, 103; 469 NW2d 10 (1991).

Here, the facts do not support defendant's assertion that he invoked his right to silence. While he was indisputably in custody, nothing in the record indicates that he unequivocally invoked his right to silence. Police refrained from questioning him at the request of his family, including his mother. Defendant's right to silence is personal and a third party may not invoke it on his behalf. See, e.g., *People v Bender*, 452 Mich 594, 649; 551 NW2d 71 (1996) (Boyle, J., dissenting); see also *Fare v Michael C*, 442 US 707; 99 S Ct 2560; 61 L Ed 2d 197 (1979) (holding that under totality of circumstances juvenile's request for probation officer was not an invocation of Fifth Amendment *Miranda* rights and that his waiver of rights was knowing and voluntary).

Had defendant asserted his right to silence, the trial court did not did not err here. The privilege against self-incrimination is not absolute. Evidence of a defendant's silence may be used to rebut an inference raised by the defense that the police treated the defendant unfairly. *People v Crump*, 216 Mich App 210, 214-215; 549 NW2d 36 (1996). In *Crump*, the trial court was allowed to admit testimony of defendant's silence to rebut the inference from earlier testimony that defendant was not given an opportunity to make an exculpatory statement. *Id*. at 213-214.

Here, the prosecution refuted defendant's argument that police conducted a flawed investigation. At trial, defendant argued that the police would have had a more accurate version of his statement if they had recorded it. In response, the prosecution offered evidence that the police wanted to record the statement, but that defendant would not give a recorded statement. Accordingly, we conclude that the evidence was properly admitted to rebut defendant's assertions that he had not been given the opportunity to record an exculpatory statement.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra